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CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OHIO: NOVEMBER TERM, 1847.

SARAH W. STORY AND ANOTHER, EXECUTORS OF JOSEPH STORY, DECEASED, *v.* JAMES P. HOLCOMBE AND OTHERS.

[FROM THE NOTES OF JUDGE MCLEAN.]

COPYRIGHT—ABRIDGMENTS—EXTRACTS.

Every abridgment of a work, however fair, does more or less affect the sale of the original work.

The theory that such a work adds to the value of the original work, by making it more extensively known, is unfounded in fact. A copyright of an author should be protected by the same rule that applies to a patented machine.

Any machine, however differently constructed, which acts upon the same principle, violates the patent.

A fair abridgment contains the principle of the original work. A compiler or reviewer cannot extract from an author so as to convey the same knowledge as the original book.

There is a clear distinction between an abridgment and a compilation. The abridgment necessarily adopts the same arrangement, and conveys the same knowledge in a condensed form.

A compiler can neither adopt the arrangement, nor convey by his extracts the same knowledge.

A fair abridgment, though it injure the sale of the original book, is lawful.

The same effect, by a compiler, renders his work unlawful.

The intent with which extracts are made, can be of little or no importance.

A part of a book may be an infringement, and the other parts not.

In such a case the relief will only extend to the part considered to be an infringement.

Complainants are executors of Joseph Story, deceased, who was the author and proprietor of the copyright of "Commentaries on Equity Jurisprudence." Defendants are the author and publishers of "An Introduction to Equity Jurisprudence, on the Basis of Story's Commentaries."

The bill alleges that the latter is an infringement upon the former in three respects: 1. that the work is derived from the Commentaries; 2. that its plan, combination, and arrangement of materials, are copied therefrom; 3. that the one is pirated from the other. The prayer is for an injunction, account, surrender of copies, and general relief.

Defendants answer, admitting title in plaintiffs, but denying the charge of infringement. They allege that their work is a fair and *bona fide* abridgment of the Commentaries, such as they have a right to make.

General Replication.

At the July term, 1846, after argument, on motion for a preliminary injunction, the case was referred to E. D. Mansfield, a special Master Commissioner, to report upon the usual matters required in such cases, in order to enable the Court to determine how much, if any, of defendants' work, is a piracy from the plaintiffs' work.

The Master reported, and the complainants filed exceptions, denying that the facts were correctly found, and alleging that the report was indefinite and argumentative. But these exceptions were waived at the hearing.

The two principal questions presented by the argument were—

1. Whether, in this country, even a fair abridgment of a scientific work, is the subject of copyright:

2. If so, whether the work of defendants is a fair abridgment of the work of complainants.

The case was argued at great length by T. Walker and J. C. Wright for complainants, and by J. P. Holcombe and W. Y. Gholson for defendants.

Opinion of the Court by Judge McLean. The plaintiffs in this case complain that the defendants, in printing and publishing "An Introduction to Equity Jurisprudence, on the Basis of Story's Commentaries, &c., by James P. Holcombe," have infringed the copyright in Judge Story's "Commentaries on Equity Jurisprudence;" and they pray that the defendants may be enjoined, &c.

The defence set up is, that the work complained of is a *bona fide* abridgment of the Commentaries.

The special Master, to whom both works were referred, reports, that "the chapters and the subjects are the same in both."

He states that the "Equity Jurisprudence" of Judge Story contains one thousund eight hundred and fifty six octavo pages, including notes;" and that the "Introduction to Equity," by Mr. Holcombe, contains three hundred and forty-eight octavo pages, including notes:" That "a page in Holcombe contains a little more than one of Story; that, reduced to the same sized page, the ratio in the amount of matter in Holcombe's book to that of Story, is about in the relation of two to nine; that, in the entire work of Story, there are two hundred and twenty-six pages, constituting nearly an eighth part, on which there is some matter which has been extracted in the same language, or very nearly so, into the book of Mr Holcombe. This matter comprizes eight hundred and seventy-nine lines of Mr. Holcombe's book, which is about equivalent to twenty-four pages of Holcombe and thirty of Story, which makes one fifteenth part of Holcombe and one sixtieth of Story. This matter is found in scattered paragraphs in the first third of Holcombe's book." And the Master states, that "all the other portions of the 'Equity Jurisprudence' of Judge Story have been abridged by Mr. Holcombe without any transcription of the common language or words of Story. The part so abridged by Holcombe comprehends two thirds of his book."

The first hundred pages of Mr. Holcombe's book, which comprise ten chapters, contain about two thousand lines, exclusive of notes, about nine hundred of which are copied from Judge Story's Commentaries. From the succeeding chapters of Story, Mr. Holcombe has copied certain passages; but generally he has abridged the matter so as to reduce it, in his own language, to a small space. Very few, if any of the notes are taken from Story.

After a very able and laborious examination of the two works, the special Master comes to the conclusion that there is no infringement; but that the work of Holcombe is a fair abridgment of the Commentaries of Judge Story.

It was agreed that the cause should be argued and decided on its merits, and not on exceptions to the report of the Master.

This controversy has caused me great anxiety and embarrassment. On the subject of copyright, there is a painful uncertainty in the authorities; and indeed there is an inconsistency in some of them. That the complainants are entitled to the copyright which they assert in their bill, is not controverted by the defendants. The decision must turn on the question of abridgment.

If this were an open question, I should feel little difficulty in deciding it. An abridgment should contain an epitome of the work abridged—the principles, in a condensed form, of the original book. Now it would be difficult to maintain that such a work did not affect the sale of the book abridged. The argument that the abridgment is suited to a different class of readers, by its cheapness, and will be purchased on that account by persons unable or unwilling to purchase the work at large, is not satisfactory. This to some extent may be true; but are there not many who are able to buy the original work, that will be satisfied with the abridgment? What law library does not contain abridgments and digests, from Viners and Comyns down to the latest publications. The multiplication of law reports and elementary treatises, creates a demand for abridgments and digests; and these being obtained, if they do not generally, they do frequently prevent the purchase of the works at large. The reasoning on which the right to abridge is founded, therefore, seems to me to be false in fact. It does, to some extent in all cases, and not unfrequently to a great extent, impair the rights of the author—a right secured by law.

The same rule of decision should be applied to a copyright as to a patent for a machine. The construction of any other machine which acts upon the same principle, however its structure may be varied, is an infringement of the patent. The second machine may be recommended by its simplicity and cheapness; still, if it act upon the same principle of the one first patented, the patent is violated. Now an abridgment, if fairly made, contains the principle of the original work, and this constitutes its value. Why, then, in reason and justice, should not the same principle be applied in a case of copyright as in that of a patented machine? With the assent of the patentee, a machine acting upon the same principle, but of less expensive structure than the one patented, may be built: and so a book may be abridged by the author, or with his consent, should a cheaper work be wanted by the public. This, in my judgment, is the ground on which the rights of the author should be considered.

But a contrary doctrine has been long established in England, under the statute of Anne, which, in this respect, is similar to our own statute; and in this country the same doctrine has prevailed. I am, therefore, bound by precedent; and I yield to it in this instance, more as a principle of law, than a rule of reason or justice.

The infringement of a copyright does not depend so much upon the length of the extracts as upon their value. If they embody the

spirit and the force of the work in a few pages, they take from it that in which its chief value consists. This may be done to a reasonable extent by a reviewer, whose object is to show the merit or demerit of the work. But this privilege cannot be so exercised as to supersede the original book. *Bromhall* v. *Holcomb*, 3 *Mylne & Craig* 337; *Folsom* v. *Marsh*, 2 *Story* 116.

In the language of *Godson* 352, "the extracts must not be made too freely. Sufficient may be taken to form a correct idea of the whole; but no one is allowed, under the pretence of quoting, to publish either the whole or the principal part of another man's composition; and therefore a review must not serve as a substitute for the book reviewed. If so much be extracted, that the article communicates the same knowledge as the original work, it is an actionable violation of literary property. *Wilkins* v. *Aikin*, 17 *Ves.* 422; *Rowarth* v. *Wilkes*, 1 *Camp.* 97.

In *Folsom et al.* v. *Marsh et al.*, 2 *Story* 106, it is said: "No one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purpose of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticise, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy." This doctrine seems to consider the intention with which the citations are made as necessary to an infringement. In *Cary* v. *Kearsley*, 5 *Esp. N. P. c.* 170, Lord Ellenborough takes the same view. But I cannot perceive how the intention with which extracts were made, can bear upon the question. The inquiry is, what effect must the extracts have upon the original work. If they render it less valuable by superseding its use, in any degree, the right of the author is infringed; and it can be of no importance to know with what intent this was done. Extracts, made for the purpose of a review, or a compilation, are governed by the same rule. In neither case can they be extended so as to convey the same knowledge as the original work.

But the great question in the case is, whether the book of Mr. Holcombe is a fair abridgment of that of Judge Story.

The word abridge means "to epitomize," "to reduce," "to contract." In *Strahan* v. *Newberry*, *Lofts. Rep.* 775, Chancellor Apsley said, "to constitute a true and proper abridgment of a work, the whole amount must be preserved in its sense, and then the act of abridgment is an act of the understanding, employed in carrying a

larger work into a smaller compass." In this view Mr. Justice Blackstone concurred, who seems to have been consulted by the Chancellor. Mr. Justice Story says, in *Folsom* v. *Marsh*, 2 *Story Rep.* 106–7: "So it has been decided, that a fair and *bona fide* abridgment of an original work, is not a piracy of the copyright of the author; but then, what constitutes a fair and *bona fide* abridgment, in the sense of the law, is one of the most difficult points, under particular circumstances, which can arise for judicial discussion. It is clear, that a mere selection, or different arrangement of parts of the original work, so as to bring the work into a smaller compass, will not be held to be such an abridgment. There must be real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon, and not merely the facile use of the scissors, or extracts of the essential parts, constituting the chief value of the original vork."

In *Gyles* v. *Wilcox*, 2 *Atk.* 143, Lord Hardwicke said, "where books are colorably shortened only, they are undoubtedly within the meaning of the act of Parliament, and are a mere evasion of the statute, and cannot be called an abridgment."

A fair abridgment of any book is considered a new work, as to write it requires labor and the exercise of judgment. It is only new in the sense that the view of the author is given in a condensed form. Such a work must not only contain the arrangement of the book abridged, but the ideas must be taken from its pages.

It must be in good faith an abridgment, and not a treatise, interlarded with citations. To copy certain passages from a book, omitting others, is in no just sense an abridgment of it. It makes the work shorter, but it does not abridge it. The judgment is not exercised in condensing the views of the author. His language is copied, not condensed; and the views of the writer, in this mode, can be but partially given. To abridge is to preserve the substance, the essence of the work, in language suited to such a purpose. Gould's Abridgment of Allison's History of Europe gives all the material facts of the original work, covering the whole line of the narrative: and this, in a legal sense, may be called an abridgment.

In the argument it was insisted, that an elementary work is not a proper subject for abridgment. There may be works which are not susceptible of this process. Treatises on the exact sciences may constitute an exception; but works on law, elementary or otherwise, are not within the exception. Hale's Pleas of the Crown, Blackstone's Commentaries, and Kent's, have been abridged, and other

works of similar character. What is the character of the work complained of? Upon its title-page it does not purport to be an abridgment, but "An Introduction to Equity Jurisprudence, on the Basis of Story's Commentaries;" and in the preface the author says, "it is not intended to supply the place of the Commentaries, with any class of readers, but to serve simply as an introduction, a companion, and a supplement to their study. The text is substantially an abridgment of that work. The same general plan and arrangement has been pursued, and the elementary principles which are supposed to possess most practical value, selected and presented, with appropriate illustrations, in a greatly condensed form. The author has felt at liberty to make very considerable alterations and additions, (entirely, however, of an elementary character,) believing that this course would not diminish, but increase the adaptation of his own work, to be a companion to the study of the Commentaries."

If this book were intended to be a mere abridgment of the Commentaries, the fact is not indicated in the title. Within my knowledge no abridgment has been made of any book which has not been so entitled. An "Introduction" may be an exordium, a preface, or the preliminary part of a book; but it is not an abridgment. The author says "the text is substantially an abridgment of the Commentaries;" but he also says, that "he has felt at liberty to make very considerable alterations and additions." Alterations of the original work, and additions to the text, are not appropriate to an abridgment. In saying, therefore, that "the text is substantially an abridgment," Mr. Holcombe could have meant nothing more than that, in writing his book, he followed the arrangement of the Commentaries, extracting certain parts, condensing others, with "very considerable alterations and additions" of his own. A supplement to the Commentaries, which Mr. Holcombe says, in some sense is the character of his work, may supply defects in the original; but it can in no sense be considered an abridgment. This remark seems to have been made in reference to the notes added by the author.

It may not be essential to exclude extracts entirely from an abridgment; but in making extracts merely, there is no condensation of the language of the author, and consequently there is no abridgment of it. Much looseness is found in the decisions upon this subject. Some of the Judges would seem to consider, that where a book is greatly reduced in its size, though made up principally of extracts, it is an abridgment. In a book of Reports, such

as "Bacon's Abridgment," the language of the Court is necessarily adopted often to show the principle of the decision. But the same necessity does not exist, and the same license cannot be exercised in abridging an elementary work. In the case of the assignees of *Johnson* v. *Kennedy*, 1 *Amb.* 402, it was held, that abstracts made from a tale written by Johnson, called the "Prince of Abyssinia," did not infringe the copyright; but that decision was much influenced by the fact, that the author himself had published similar abstracts in a periodical paper. In *Emerson* v. *Davies*, 3 *Story* 795, Judge Story says: "To amount to an infringement, it is not necessary that there should be a complete copy or imitation in use throughout; but only that there should be an important and valuable portion which operates injuriously to the copyright of the plaintiff."

All the authorities agree that to abridge requires the exercise of the mind, and that it is not copying. To compile is to copy from various authors into one work. In this the judgment may be said to be exercised to some extent in selecting and combining the extracts. Such a work entitles the compiler, under the statute, to a right of property. This right may be compared to that of a patentee, who, by a combination of known mechanical structures, has produced a new result.

Between a compilation and an abridgment, there is a clear distinction; and yet it does not seem to have been drawn in any opinion cited. A compilation consists of selected extracts from different authors: an abridgment is a condensation of the views of an author. The former cannot be extended so as to convey the same knowledge as the original work: the latter contains an epitome of the work abridged, and consequently conveys substantially the same knowledge. The former cannot adopt the arrangement of the works cited; the latter must adopt the arrangement of the work abridged. The former infringes the copyright, if matter transcribed, when published, shall impair the value of the original book: a fair abridgment, though it may injure the original, is lawful. 1 *Brown Ch. R.* 451; *Gyles* v. *Wilcox*, 2 *Atk.* 141.

There is, then, a right which the abridger may exercise, far beyond that of a mere compiler. His labor is of a different kind, and of a higher order. It is therefore important that the works of these two characters should not be so blended as to place them upon the same footing: and yet, in many of the decisions, no distinction is made between them. The same facts and reasoning are applied indiscriminately to both cases; and not unfrequently there is a con-

fusion in the argument, which tends more to perplex than to enlighten the reader.

In the case of *Folsom* v. *Marsh*, above cited, Mr. Justice Story says: "It seems to me, therefore, that is a clear invasion of the right of property of the plaintiffs, if the copying of parts of a work, not constituting a major part, can ever be a violation thereof; as, upon principle and authority, I have no doubt it may be. If it had been the case of a *bona fide* abridgment of the work of the plaintiffs, it might have admitted of a very different consideration."

It is said that in many parts of the Commentaries there are citations from other works. This is true. And who could write a book entirely new upon jurisprudence? Principles, not familiar to the profession, could be of little value and of no authority. No author, by copying from others, can withdraw from general use, that which has been given to the public. Judge Story did not intend his book to be an abridgment, but a treatise on jurisprudence: and the approbation of this work by the profession, in this country and in England, is high evidence of its merit, and of the great learning and ability of the author.

Whatever doubts may have been formerly entertained, it is now clear, that a book may, in one part of it, infringe the copyright of another book, and in other parts be no infringement; and in such a case, the remedy will not be extended beyond the injury. Lord Hardwicke once laid down a doctrine contrary to this; but that opinion has been overruled by subsequent decisions.

Nearly one half of the text, in the first hundred pages of Mr. Holcombe's book, appears to have been extracted from Story. That this was done by him under a conviction that he was exercising a common right, no one acquainted with his legal talent and honorable bearing, can doubt. But these constitute no criterion for the decision of the case. That the view of Mr. Holcombe in this respect, is not without a seeming sanction, in the opinion of some Judges, is admitted.

To class these extracts under the head of "abridgment," would seem to be a perversion of terms. Whatever else this part of Mr. Holcombe's book may be called, it is not an abridgment. With greater propriety it may be called a compilation, as the extracts contained in it are taken from various authors. As a compilation, this part of the book must be considered an infringement of the right of the plaintiffs, by the copious extracts made from the Commentaries, and the classification of the subjects copied from them.

So far as citations are made in the Commentaries, Mr. Holcombe had a right to go to the original works, and copy from them; but he could not avail himself of the labor of Judge Story, by copying the extracts as compiled by him. This is a well established principle. Nor could he copy the plan or arrangement of the subjects in the Commentaries. It is said there can be no copyright in a plan, distinct from the work itself, any more than there can be a copyright in an idea. This is admitted: but the words in which an idea is expressed, is a subject of property; and so is the classification of the subject discussed.

Looking at the smallness of Mr. Holcombe's book, in comparison of that from which it was principally taken, one might suppose that the former was a short abridgment of the latter. But this comparison of size or number of pages, affords no guide to a proper decision. The character of the work must depend upon its matter: and it would seem, from the considerations stated, that the first third part of Mr. Holcombe's book, including one hundred pages, cannot be justly and legally called an abridgment, as it does not possess the essential ingredients of such a work; and that, viewing it as a compilation, it is an infringement of the plaintiffs' right, on the ground that the plan of the Commentaries is copied; and also for the reason that the extracts extend beyond the proper limit for such a work. The remaining two thirds of the book may be comprehended under a liberal construction of an abridgment. The matter is greatly condensed by Mr. Holcombe in his own language, and in a manner highly creditable to him.

The prayer of the bill, as to the first hundred pages, is granted.

I have been brought to this result reluctantly, being sensible that the motives of Mr. Holcombe were honorable, and that there was no intention on his part, unjustifiably, to appropriate the labors of Judge Story to his own advantage. In this view, I cannot refrain from saying, that an adjustment of the controversy by the parties themselves, would be extremely gratifying to me; and, from my intimate knowledge of the eminent qualities of my lamented brother, and I will add, of his unbounded respect for talent and high character, that I cannot be mistaken in saying, if he were living, an amicable adjustment would be most gratifying to him.

NOTICE TO AN INDORSER, &C.

Chick v. Pillsbury.

Chick *v.* Pillsbury, reported in 24 *Maine*, (11 *Shipley*,) *Reports* 458, is an interesting case, upon a point of very extensive application, and is well worthy of a careful perusal. It was an action against an indorser of a promissory note, who contended that he had not been *seasonably* notified of the dishonor of the note by the maker. The note became due in the city of New York, on the 29th Nov. The mail closed there, daily, at six o'clock, A. M., for Bangor, the residence of the defendant. The notice of the dishonor of the note was not put into the post office at New York until the latter part of the next day, being the 30th Nov., and therefore not in season to go before the morning of the first of December. Was this seasonable notice?

"It is not a little singular," says Mr. Chief Justice Whitman, who delivered the opinion of the Court, "that a question of this kind should, to this day, have remained in doubt." In *Goodman* v. *Norton*, 17 *M.* 381, it was held that the notice of dishonor must be put into the post office on the day of the demand upon the maker, or in season to be sent by the first mail of the succeeding day. *Beckwith* v. *Smith*, 22 *M.* 125, recognizes the same principle as the rule of law. "These decisions," says the Chief Justice, "we are now called upon to revise; and although supported by numerous dicta to be found in the elementary treatises and reports, yet, if erroneous, we cannot hesitate to do so."

The learned Chief Justice proceeds to examine the cases, of *Whitewell* v. *Johnson*, 17 *Mass. R.* 449; *Bank of Alexandria* v. *Swan*, 9 *Peters* 33; *Geill* v. *Jeremy*, *M. & M.* 61, *S. C.* 22*d E. C. L.* 249; *Frith* v. *Thrush*, 8 *B. & C.* 387, *S. C.* 15, *E. C. L.* 242; *Wright* v. *Shawcross*, 2 *B. & Ald.* 501; *Hawkes* v. *Sulter*, 4 *Bing.* 715. *S. C.* 15 *E. C. L.* 125; *Freeman's Bank* v. *Perkins*, 18 *Maine* 292; *Howard* v. *Ives*, 1 *Hill*, *N. Y.* 263; *Bray* v. *Hadwin*, 5 *M. & S.* 68; and continues:

"In Kent's Commentaries, (vol. 3, p. 106,) the author lays down the law to be "That, if the third day of grace be on Thursday, and the drawer and indorser reside out of town, the notice may indeed be sent on Thursday, but must be put into the post office on Friday, so as to be forwarded as soon as possible thereafter." And

again, (same page,) "It seems to be now settled, that each party, into whose hands a dishonored bill may pass, shall be allowed one entire day for the purpose of giving notice." And it was so held in *Bray et al* v. *Hadwin*, 5 *M. & S.* 68. In a note in Kent's Commentaries, (vol. 3, p. 107, 4th ed.) the author says, "The rule, in *Lenox* v. *Roberts*, 2 *Wheat.* 373, was laid down too strictly, when it stated, that the demand of payment should be made upon the last day of grace, and notice of the default be put into the post office early enough to be sent by the mail of the succeeding day." And, although this decision was spoken of with approbation in the *Bank of Alexandria* v. *Swan*, 9 *Peters* 33; yet, "that the decision only is, that the notice need not be put into the post office on the day of the default." And again, (same page,) "That this principle will sustain the rule, as more generally and best understood, in England and the commercial part of the United States, that notice put into the post office on the next day, *at any time of the day*, so as to be ready for the first mail that goes thereafter, is due notice."

In *Story on Bills*, § 288, it is laid down, "That, if the post or mail leaves the next day after the dishonor, the notice should be sent by that post or mail, if the time of its closing or departure is not *at too early an hour* to disable the holders from a reasonable performance of the duty." And again, (§ 290,) "He, the holder, is always allowed by law a whole day for this purpose." Under this last section, in a note, he makes a long extract from *Chitty on Bills*, in which this passage occurs: "Another reason is, that the holder ought not to be required, *omissis omnibus aliis negotiis*, to occupy himself immediately in forwarding notice to the prior parties, when, by delaying that step till the next morning, he would, after the pressure of the other business had subsided, have in the evening, or *early the next morning*, before the general business commences, time to look into his accounts with the other parties." This author is again quoted in the note, as saying, in another part of his work, that notice must be sent off by the post of the next day, whether it goes early or late. Upon this passage, Judge Story remarks: "It appears to me, the rule is not so strict as it is laid down in this last passage of Mr. Chitty, and that it would be more correct to say, that the holder is entitled to one whole day to prepare his notice, and that therefore it will be sufficient, if he sends it by the next post, that goes after twenty-four hours from the time of dishonor." This shows what this learned author understands by one whole day, so often repeated, in the cases upon this point. And it may be difficult to affix

any other understanding or meaning to that phraseology. Judge Story, however, admits that in this he is supported by the authority of no adjudged case directly, but thinks it results from the authorities on the subject. That Mr. Chitty's last quoted sentence is liable to exception, is manifest from the preceding quotation from his work, for the latter cannot be reconciled with the former, or with the adjudged cases.

The authorities cited on the part of the counsel for the defendant, are numerous, tending to show that the notice to drawers and indorsers, not resident in the places where the holder of their dishonored paper may live, should be given as early as by the mail of the next day, and some of them, such as the *dictum* in the last extracts from Chitty, and the cases of *Goodman* v. *Norton* and *Beckwith* v. *Smith*, seem to go the length of holding that notice should be given by the mail of the next day, however early it might start. But the question pending in the reported cases, generally was, whether the notice should be sent the same day, or by the mail of the succeeding day, and did not present the question whether it should be sent by the mail of the next day, however early it might start, or by a late mail, or a reasonably practicable mail.

In a late case *Chouteau* v. *Webster*, 6 *Metc.* 1, it appears a note was protested in New York, at 3 o'clock, on the afternoon of one day, and that the notice of dishonor was dispatched to the indorser, by being put into the post office in New York for him the next day. Mr. C. J. Shaw, in delivering the opinion of the Court in that case, says it is admitted "that notice thereof, (of the dishonor) in due form, was seasonably prepared by the proper officer, and put into the post office." Nothing is said in the case as to the hour of the day when the mail was made up to convey the notice to the defendant, nor of the precise time of the day when the notice was put into the post office. If either had been material, surely it would have been attended to, either in the statement of the case, or in the arguments of counsel. It could not well have escaped the notice of the counsel for the defendant, aided as he must be believed to have been, by the superior legal knowledge of the latter.

A majority of the Court is, therefore, brought to the conclusion, that the weight of the more modern authorities, both in England and America, is decidedly in favor of a rule of a more convenient and reasonable operation. It may not go to the extent of allowing at least twenty-four hours for the purpose of dispatching notice, though it might tend to certainty and precision, if such were the case. It

seems to be without question, that it extends to the allowance of a convenient time, after business hours of the next day after the dishonor shall have commenced, to prepare and dispatch notice. To the decision of this cause, it is not necessary to consider whether the rule should extend further or not. The notice was mailed in season to go by the next mail, which left, after the business hours of the day, succeeding that of the dishonor, had commenced.

The Court, therefore, held, that the notice was in time to charge the indorser.

Judge Shipley dissented. In his opinion he refers to the remarks of Mr. Justice Bayley, in his treatise, who states the rule to be, that "to such of the parties, as reside in the place, where the presentment was made, the notices must be given at the farthest, by the expiration of the day following the refusal; to those who reside elsewhere, by the post of that or the next post day." Mr. Chitty, in his work, says: "The rule is now well settled, that the holder must, in order to subject all the parties to actions at his suit, give or forward all his notices to every one of the indorsers, and to the drawer, whose residence he can ascertain, on the day after the bill or note was dishonored;"—and, again: "When the parties do not reside in the same place, and the notice is to be sent by the general post, then the holder, or party to give the notice, must take care to forward notice by the post of the next day after the dishonor, or after he received notice of such dishonor, whether that post sets off from the place, where he is, early or late."

The learned judge proceeds to examine many authorities upon the subject, and concludes: "The result of this examination, is a conviction, that the rule, as before stated by Bayley and Chitty, is fully established; that it has become the settled law in England and in the United States; that, in the application of it in practice, the Lord's day is not to be accounted a day of business, or taken into the account; that the rule, that each party has a day to give notice, was never intended to be, and should not be construed so as to be in conflict with any other established rule; that no modern case has been found, which has actually decided the right of parties upon a different doctrine; and that the only opinions opposed to these positions, are those of Chief Justice Best and Chancellor Kent; Mr. Justice Story suggesting one, rather for consideration, than as exhibiting the law, at the same time admitting, that it is unsupported by any decided case."

OHIO REPORTS, 15TH VOL.

[By C. C. Carroll.]

[Our reg lar correspondent, upon this subject, has withheld his article for this number, to give place to the following. Mr. Corry's communication will appear in our next. Eds.]

Fifteenth volume of the Ohio Reports. Eight hundred pages in a single year. At no very remote period, it required two years to make a volume much less than the present. But Ohio is a great State, young and vigorous, with inexhaustible resources and magnificent capacities, rapidly expanding and developing in all directions. That the law reports should yield to the universal law of enlargement, is destiny; and, if the growth be healthy and sound, is not to be complained of. Two millions of a population may well furnish an annual of eight hundred pages of select adjudications.

Nothing in Ohio is more in a state of transition and development than Ohio Law. The gladsome light of jurisprudence, from all points of the compass, is reflected upon Ohio. The recorded wisdom is lain at the feet of her judiciary. The Common Law principles of Judicial decision, as used and applied in the old countries, and as used and applied by the States of this Union, are easily accessible, but, because of our very peculiar form of government, condition, and circumstances, are found to be of circumscribed and limited utility. Ohio Law is in a state of transition and development, because the peculiarities of our political and social condition, which are of force to modify the Common Law, are not as yet pointed out and distinctly defined. There is hope that in the accumulating volumes of Ohio Reports, some light will be shed upon this dark subject. More hope in such a result we should have, if the Supreme Court, whenever they bring forward these peculiarities as an excuse for legislation, would condescend to make their meaning a little more apparent.

The Reporter of this volume appears to have discharged his duty with care and judgment. The statements of the cases are brief, clear, and confined to the facts material to the decision. So much of the arguments of counsel, and so much only, is reported as relates to the main points decided; and in most instances the arguments appear to be given in the language of the counsel. In two or three instances that I have noted, it would have been something

more satisfactory, if the Reporter had a little relaxed his rule, and reported the authorities for some of the *obiter dicta* of the Court.

In *Minus* v. *Moore et al*, (p. 570,) Judge Birchard, giving the opinion of the Court, says, that possession under a parol contract for the conveyance of land, is not a sufficient part performance to take the case out of the statute of frauds. "The authorities cited by defendants' counsel, fully sustain this position." Now, in this case, the authorities cited by defendants' counsel, are not reported. This is the more to be regretted, as this *dictum* of the Judge conflicts with several previously reported decisions of the Supreme Court. In the familiar case of *Wilber* v. *Paine*, (1 *O. R.*) the Court say: "It has frequently been held on the Circuit, that the delivery of possession" (of land) "on a parol agreement, was sufficient to take it out of the statute, and we see no reason to reverse the rule, or to reject the principles on which it is founded." In *Moore* v. *Beasley* (3 *O. R.* 296,) "This Court has decided, as often as the question has been made, that part performance may take the case out of the statute, and that delivery of possession on a parol lease, is sufficient for that purpose." In *Armstrong* v. *Kattenhorn* (11 *O. R.* 272.) "But delivery of possession in part performance of the contract," (in that case, a parol lease,) "avoids its" (the statutes) "operation. But if possession be relied upon, it must be clearly referable to the contract, and be delivered and held in performance of it." In the case under consideration, Judge B. does not refer the possession to anything but the contract. He distinctly places it upon the ground, that "nothing had been done *under the contract* but delivery of possession." Possession *under the contract*, is sufficient part performance to take it out of the statute. But if it be a possession wholly independent of the contract, wrongfully obtained, or referable to any other tenantry or title, it is not such a part performance. 2 *Story's Eq. 4th ed.*, § 763. The authorities cited by counsel, fully sustaining the position of Judge Birchard, would be interesting indeed.

Another instance in which a report of the arguments of counsel upon the particular point, would have been a little more satisfactory to at least one reader of the Ohio Reports, occurs in the case of *Benjamin* v. *La Baron's Administrator*. The Court say: "It has been claimed that an executor *de son tort* may exist in Ohio, and that we ought to review our decisions upon that point. *We are content to let the matter rest as it is.*"

I happen to know that an argument was presented to the Supreme

Court upon this point; that the argument and some forty cited authorities sustained these positions: 1st. That Executor *de son tort* is a common law office. 2d. That its existence has been recognized in the reported decisions of thirteen States of this Union, and recognized and modified by statute in Massachusetts and Connecticut. 3d. That its existence was recognized in the reported decisions of the State of New York, until abolished by statute. 4th. That in no State of this Union, and in no reported case anywhere, except in Ohio, and here, of the reported cases, only in the case of *Dixon* v. *Cassell*, (5 *O. R.*) has its existence been denied. And it was insisted that there is nothing in our form of government, circumstances or condition, so different from what obtains in the other States, as to render that common law office which is recognized there, inapplicable here. As to the case of *Dixon* v. *Cassell*, I hope that is not altogether unfamiliar to the readers of the Western Law Journal.

The Court say: "We are not disposed to introduce or sanction a principle which would draw a fund wholly to one creditor, instead of a fair distribution, as would result in case of an Executor *de son tort*." The Supreme Court of Missouri are not of this opinion. In the case of *Foster et al.* v. *Nowlin*, (4 *Mo. R.* 25) the Court say: "The question has been asked by counsel, if this view has to prevail, what is to hinder any creditor who wishes to get his whole debt free from the apportionment required by the statute from procuring some friend to intermeddle, then sue him as Executor *de son tort*, and so get his whole debt? The answer which first occurs to us is, that if this were proved to be the case, Courts of Chancery would interfere, and compel the creditor to submit to an apportionment; would, if necessary, enjoin such proceeding; and, even in cases where there is no confederacy, would, when assets ought to be apportioned, compel an apportionment."

All this, and a good deal more, was urged in argument, but not, it seems, with sufficient force to disturb, in the slightest degree, the placidity of the Supreme Court. They had said that the horse was sixteen feet high, and, happy in the possession of a fixed idea, they stuck to it. They were content!

It is proper to say that this point did not arise directly in the case, and its decision was not necessary to the judgment of the Court. The majority of the Court might very well have been *content* to say nothing about it, as the decision of that point, in the way it is decided, weakens, rather than sustains the material positions taken in the opinion. It is some evidence of this, the fact that Judge Birchard

opens his dissenting Opinion with this position: "It has been held that there is no such thing in Ohio as an Executor *de son tort.*"

Judge Birchard dissented—differing from the majority of the Court on a position that they undoubtedly decided right, and agreeing with them on a position, which, if there be any efficacy in abundance and uniformity of authority, they undoubtedly decided wrong. If I understand this dissenting opinion of the judge, which is remarkable for the absence of point and logical sequence, and the presence of irrelevant statements, he means to say that, there being no Executors *de son tort* in Ohio, the administrator is trustee for the creditors, and, in relation to the estate, can do any thing which creditors could do; that is, can maintain an action of trover for goods; which the intestate, in his life-time, had fraudulently transferred. That is rather a strained inference. Because the Court has legislated away the remedy from the creditor, does it thereby follow that it has conferred that remedy upon the personal representative of the intestate? *A priori* it will require some positive legislation to do that. But Judge Birchard may be right in assuming that the Court, having disposed of the Executor *de son tort*, may as well finish the business by conferring upon the administrator a character to match, and be *content* to let the matter rest there.

The Judge says: "He," the administrator, "is authorized expressly to pursue his legal action to obtain possession of lands fraudulently conveyed, and, *a fortiori*, he may sue for and recover the personal property so conveyed." That is to say, the statute innovates upon the common law, by authorizing the administrator to recover the lands fraudulently transferred by the intestate, and therefore, *a fortiori*, he may recover personal property so conveyed! Knowest thou not, O Judge, that statutes innovating upon the common law are to be strictly construed! *Dwarris on Stat.* 695. "The law rather infers that the act did *not* intend to make any alteration, *other* than what is specified, and *besides* what has been plainly pronounced; for if the parliament had had that design, it is naturally said, they would have expressed it." *Ib.*

In *Bayless* v. *the Belmont Bank of St. Clairsville*, Judge Birchard informs us, that a *bond*, "To be good at common law, there must have been parties able to contract, their minds must have united in making the contract, and upon a good consideration, which consideration must have been the one agreed to, and existing as executory or executed, at the delivery of the bond;" *p.* 620. The question was, whether a bond intended as a statutory writ of error bond,

but, for irregularity, failing of that, could be held valid as a common law bond. The Court say: "As a common law bond, there must have been a consideration. In this case, the sole consideration was, that it should operate to supersede the *ca sa*," etc.

Now, truly, if this be a correct notion of a common law bond, it takes us a little aback. Is it not very common and familiar learning that a seal imports a consideration? "*A contract by deed requires no consideration to support it;* or perhaps it might be more correct to say that the law *conclusively* presumes that it was made upon a good and sufficient consideration." *Smith's Law of Contracts, p.* 13.

The Court evidently sink the distinction between a sealed instrument and a parol contract, and talk of a bond precisely as if it were a parol contract between parties. Were it allowable to attribute such a blunder to anything but the grossest heedlessness, we might conjecture that the Court, in this instance, was misled by counsel. The counsel for the plaintiff in error specifies a "sufficient consideration" as among the requisites of a "good common law bond;" and of that particular bond he says: "It failed to accomplish what was intended by the maker, and remained a *nudum pactum*." A bond, a *nudum pactum!*

Remotely possible it is, that the statute, making the want or failure of consideration a defence to an action upon a specialty, is regarded by the Court as abolishing altogether the common law efficacy of a seal, and as placing bonds upon the same footing with parol contracts. But, clearly, the statute does not make void the bond for want of a consideration, but gives a defence available only "by special plea, or by notice attached to, and filed with, the plea of the general issue." In this case, "Bayless craved oyer of the bond and condition, and pleaded that the same had been obtained of him without consideration."

But the Court say nothing of the plea, or of the statute by which it was authorized. And, indeed, if a common law bond were void for want of a consideration, what propriety or utility would there be in a statute authorizing such a defence by special plea? In the case of the *United States* v. *Linn et al*, (15 *P. R.* 311,) cited by the Court, Justice Thompson talks of the "instrument" in that case very much as Judge Birchard talks of the bond in this, but it is after having decided that, "There being no seal to the instrument, it is not a bond." The Court could not have been misled by that case. And this is not *obiter dicta*, but a material and turning point in the case; and to all appearance, judging alone from the opinion,

as given by Judge Birchard, the Belmont Bank of St. Clairsville lost $12,000, because of this singular misapprehension of the Court. What would have been the result had the Court decided upon the want of consideration as pleaded, of course, I know not; what it ought to have been, is not an investigation within the proposed limits of these remarks.

The style of Judge Read is not very elevated. Speaking of the suggestion that a statutory recognizance, taken without authority, might take effect as a common law bond, he says: "In matters of criminal procedure, the law tolerates no *mongrel* of this sort. The construing a matter to be another thing, because it is not what it purports to be, to give it effect, and at all events to keep it alive, leads to the production of a kind of judicial *hybrid* which has no name or place among the clear and well defined principles of the law," etc.; *p.* 581. I do not think the Judge particularly fortunate in this rhetorical flourish. *Hybrid* is not a good illustrative figure of a subject which must be either one thing or the other. A hybrid is *neither* one thing nor the other.—

> "Some neither can for wits or critics pass,
> As heavy mules are neither horse nor ass."

The Court, it seems to me is unreasonably annoyed because of the technicalities and subtleties of the law, and the ingenuity of counsel. "No man unlearned in the law, if of sound sense, reasoning fairly, and untrammelled by technicalities," etc., (Judge Birchard, p. 423-4.) "Apart from legal subtleties and guided by the lights of sound logic," (ib.) The rule in Shelly's case: "It is at best but a mere artificial technicality," (Judge Read, p. 563.) "Ingenuity is quite active oftentimes in suggesting reasons why money should not be paid to hands and contractors for labor performed; and much distress is sometimes manifested lest the court should compel a man to pay his honest debts," (Judge Read, p. 555.) Justices of the Peace "are not, in general, professional men, who are familiar with legal technicalities and the *subtle niceties* which distinguish the different forms of common law actions," (Judge B., p. 558.)

That will do. *Subtle niceties* may stand for the climax of refinement. A subtle nicety must be a nicety indeed. Taking them as identical, I recollect a case in point. Pope's Wife of Bath, speaking of her intercourse with one of her husbands, says—

> "At first, I levied a tax upon his need,
> Then let him——'twas a *nicety indeed.*"

The Supreme Court almost provokes us to believe that, in their ap-

prehension, there is something sinister and iniquitous in legal distinctions, or, as the court say, technicalities and subtleties of the law.—They seem to speak of the ingenuity and zeal of counsel as something reprehensible and worthy of censure.

As quite active ingenuity is a thing to be complained of, will the court do us lawyers the favor to suggest how much activity of ingenuity it will be proper for us to exert? And as zeal amounting to *distress* is not allowable, perhaps the court will do us the same favor in the matter of zeal.

Perhaps there is in this thing "subtlety," something relative to the intelligence that regards it. To the highest intelligence nothing is subtle. To a being thus endowed, the remotest and slightest relations are as apparent as the most palpable existence. On the other hand, to the new born intellect every existence is a wonder, and every relation a subtlety. Wonders and subtleties recede as knowledge and intellectual power advance. The difficulties of the tyro and the subtleties of the sciolist are not subtleties to him who is master of his subject.

Characterizing legal distinctions as technicalities and subtleties, and appealing to sound logic, good sense, or common sense, are the usual preludes to judicial legislation. Such an introduction is generally followed by a decision made up upon a partial or incomplete view of the subject. Generally the appeal is to familiar facts and opinions, and excludes facts and relations of which the uncultivated mind is impatient, for the very reason that they are unfamiliar. Generally the appeal is to those formed opinions which are called prejudices; a tenacious, exclusive and intolerable adherence to which, constitutes bigotry. Not unfrequently an appeal to common sense implies not only an imperfect mastery of the subject, but an inability to master it. Nevertheless I concede that an appeal to common sense may be well taken, and object only that the appellants too often mistake the tribunal. The faculty or power that discerns the true is common sense.—It is the healthy condition of every right minded man, and to which he never thinks of appealing because he is always in court. Common sense, it is said, is as rare as genius. If so, we should appeal to it, especially to our own common sense, good sense, or sound logic, with diffidence as a test of truth.

There is an air of arrogance, pretension and dogmatism about the decisions of Judge Read. He says—"A vast number of books and authorities have been cited in this case. *I* have not cited them expressly in *my* opinion. *I* am content to extract the essence, and *do*

not choose to become a compiler;" (p. 565.) Doubtless the statements and reasonings of a decision may be so obvious, so self-evident or so cogent as to require no authorities to sustain them. The reputation of a judge may be such as to make his least considered word almost oracular. But a judge contemptuously declining to cite authorities because he does not choose to become a compiler, I think is original.

In this same opinion in which Judge Read is so confident of having extracted the essence of "books and authorities," he says—"The rule in Shelly's case is not a rule of construction, but a law of property. It is not designed to give a meaning to words, but to fix the nature and quantity of an estate;" (p. 562.) Now I guess that the *essence* of the books and authorities is, that the rule in Shelly's case *is* a rule of construction, *and* a law of property; that it *is* designed to give a meaning to words, *and* to fix the nature and quantity of estate that those words shall convey. But this is passing into a region of criticism where the material is much too abundant to be attractive.

I have aforetime expressed the conviction that the Supreme Court of Ohio legislates with great freedom. "The nature of our government and free institutions" (p. 563) is a constantly recurring excuse for judicial legislation. It is always at hand and ready at all times to be dragged in to abrogate or modify a "rule which had its origin in feudal tenure," (p. 562) or to darken the "light of precedent from another country," (p. 563) and is governed by no rule but the discretion of the Judge. I concede, certainly, that "cases do often occur, in the multifarious relations and transactions of mankind, where it is, by no means, an insuperable objection to the remedy sought to be obtained, that there is no *direct* adjudication in point. Rules of law must sometimes, of necessity, be extended to suit the local condition and meet the exigencies of every people." *Judge Wood, p.* 730. *Extending* the rules to the new circumstances, is undoubtedly the legitimate province of the Court. That is not the evil complained of. The evil is, the discretionary judicial abrogation, or material modification of the old rules, and the institution of new ones.

If the Supreme Court legislates rather freely, it is not because they know no better. The most fastidious opponent of Judicial legislation, could ask no more than that they should abandon their practice and adhere to their precepts. Judge Birchard says: "There are many rules of established law, for which, at this day, it would be difficult to assign a good reason, were the question presented for the first time whether they should be adopted or not, and yet, because they have been rules for centuries, have become known,

and have been acted upon in all the varied transactions of business, no prudent jurists would be willing to see their authority shaken for slight causes. Where the law is uncertain, no man knoweth when he is safe. And it is, therefore, generally better to adhere to well settled, long established, and well understood rules of law, though some small inconveniences arise from them, until the Supreme power of the State sees proper to change them. A legislative enactment may make any change in the common law that even convenience requires, and it is to be presumed that the change *will* be made whenever the Legislature become satisfied that a rule of the common law works public inconvenience. Courts of justice can scarcely ever anticipate the full effect of a change made by them. In the case before them, they may possibly be able to say, the departure from the law subserves the ends of justice. They may prove that it will operate well in future transactions, but how it may affect past transactions, what may be the extent of the mischief of its retrospective operation, is often more than would be even imagined;" *p.* 516–17.

Most rightful Judge! True, we don't know precisely what amount of material is covered by the words, "slight causes," "generally better," and "some small inconvenience," but, taking a little upon trust, we repeat, most rightful Judge!

Notwithstanding these sound principles of judicial decision are entertained by the Supreme Court, the Court occasionally ventures upon the settlement of a legal question by its fiat alone. A marked instance of this, in form as well as in substance, occurs in the case of *Loring* v. *Melendy et al*; 11 *O. R.* 358. Judge Read, in pronouncing the opinion of the Court, says: "A permanent leasehold estate is not a chattel, but is, in truth, land carrying a fee. Such is the nature of the estate, and so it has been considered and treated in the legislation of our State. *We therefore declare* that permanent leasehold estates are lands, subject to all the rules and laws which attach to lands, for all purposes, and that judgment liens attach to them as lands. In thus *emancipating* permanent leasehold estates," etc. That's the way to say it. Why should not Judge Read *declare*, as well as the Emperor and Autocrat of all the Russias?

Judge Read could declare that permanent leasehold estates are land, but he could not affirm that bank notes are money. "No man can affirm," says Judge Read, "that a bank note is money." 15 *vol.* 123. Now, I guess, on every business day of the week, in his own city of Cincinnati, it is affirmed a thousand times that bank

notes are money. In every business transaction, in which, without question, preface or apology, bank notes are offered and received in discharge of a money demand, it is affirmed on the one part and assented on the other, that bank notes are money. The uniform usage and common understanding of the people of Ohio is, that bank notes are money. It has been aforetime decided in Ohio, in a case on *all fours* with the one in which Judge Read made the above remark, in an able opinion by Judge Hitchcock, that bank notes are money. *Morris* v. *Edwards*, 1 *O. R.* 189. In England, New York, and Pennsylvania, it has been decided that bank notes are money. A majority of the Judges in the case before us, decided that bank notes are money: but Judge Read dissented. The question was: Can a suit be maintained by the indorser of a promissory note payable in current Ohio Bank notes, against the maker? Judge Read decided that it cannot. "Ingenuity is quite active oftentimes, in suggesting"—embarrassments to commercial transactions—"and much distress is sometimes manifested lest the Court should compel a man to pay his honest debts." Out of thine own mouth, Judge Read!

"Nor can mere usage be permitted to take the place of the statute;" *p.* 123. Certainly not, Judge Read. But if "the words of a statute are to be taken in their ordinary and familiar signification and import, and regard is to be had to their general and popular use," (*Dwarris p.* 702,) then "mere usage," if it be uniform and universal, will aid us in ascertaining what the statute is. Would you have a statutory signification for words as distinguished from popular usage? As well write your laws in Greek, or publish them like Caligula.

Dear Reader: Should you charge that these criticisms of mine are superficial, I will not contend. I have purposely kept near the surface, and all along avoided the deep places. In a cursory reading of the volume, I have caught up a few inconsiderable trifles and, my offending hath in it that extent—no more.

SUPERIOR COURT OF THE CITY OF NEW YORK: JUNE, 1847.

In the Matter of William Gregg, an Infant.

HABEAS CORPUS—CUSTODY OF INFANT.

The general doctrine that a father has an absolute right to the custody of his child, if personally unobjectionable, cannot be sustained in this State.

When an infant possesses sufficient discretion to make a choice for itself as to the disposition of its person, all the Court will do, under a writ of habeas corpus, is, to see that all restraint is removed, and that such a choice may be made freely.

The rights of the child are alone to be considered, in such case, and those rights are to be protected in the enjoyment of its personal liberty, according to its own choice, if arrived at the years of discretion, and if not, to have its personal safety and interests guarded and secured, through the agency of those who are called upon to administer to it.

Where a child of tender years, and of feeble and delicate health, and where, therefore, the necessity of maternal care is evident, is found to be in the custody of the mother, the law will not interfere to remove it from such custody.

But where a child has arrived at the age when the superior judgment of the father may be important in laying the foundation of its future education and mental training in reference to its future establishment in life, the Court will permit the father to have such custody, inasmuch as the superintendence and judgment of the father will better subserve the true interests of the infants than those of the mother.

This case is reported in the New York Legal Observer, for July, 1847, and in the September number (1847) of the Pennsylvania Law Journal, 528.

The writ was sued out by W. Gregg, Sen., to bring up the body of his infant son, illegally detained, as was alleged, in the custody of his wife. The father and mother of the child were married in June, 1838. The child was born in Philadelphia, where the parties then resided, in May 1841. In March, 1842, the wife, for reasons which she thought sufficient, left home, taking the child with her, and went to New York, where she continued to reside with her relations. It appeared in evidence, that both father and mother were persons of good moral character, and both of sufficient pecuniary means to enable them properly to take charge of the child, and that the child, though never having been subject to any complaints other than those which are ordinarily incident to childhood, is of delicate health, and, in the judgment of the physician examined, still required the care of the mother. Of the cause of the

separation of the parents, it is unnecessary to advert, except to say that there was no fact established affecting unfavorably the general fitness of the father for the care and custody of the child.

Oakley, J. In this state of the case, the question is presented, whether I am bound by the established rules of law, to order that the custody of the child shall be surrendered by the mother.

On the hearing, it was contended by the counsel for the relator, that in the absence of any personal disqualification of the father for the safe custody of the child, the law establishes his positive right to it, to the exclusion of the mother, without regard to any other circumstance. On the part of the respondent, it was insisted that the rule of law in this State is, that it is not only the right but the duty of the Judge to consider only the interests of the child, and to exercise a sound discretion, under the circumstances of the case, in determining the question as to the custody in which it should be placed. Numerous authorities bearing upon the question, were cited from the English books, and from the decisions of the Courts in this State, and of other States of the Union. I have had occasion heretofore to examine most of these authorities, and I have again looked into them, after hearing the comments of the counsel, and especially into the more recent cases decided by the higher Courts of New York. It is from these that I must derive the rules that are to govern in disposing of the question now before me. I shall not here enter into any detailed examination of these cases, as it would be only a repetition of what has been several times done by others, but shall content myself with extracting from them the principles which they appear to establish.

The general doctrine, that the father has an absolute right to the custody of his child, if personally unobjectionable, does not seem to be sustained by the law of this State, as expounded by its highest tribunals. It is a matter of frequent occurrence, that this supposed absolute right is made to yield to the mere will of the child. In cases where the child is of sufficient discretion, though still an infant in the eye of the law, to make a choice for itself as to the disposition of its own person, all the Court does under the writ of *habeas corpus*, is to see that all restraint is removed, and that such choice may be freely made; and this choice may be not only in favor of either parent against the other, but is not unfrequently opposed to the wishes and claims of both, the child preferring to place itself in the care and custody of strangers.

The question then, as to the alleged superior right of the father,

can only arise when the child cannot, as in the present case, choose for itself; and here the real point at issue between the parties presents itself, the relator contending that in such a case the law determines that the safest place for the child is under the care and custody of the father, and the respondent insisting that the question is left at large, to be determined by the Court exercising a sound discretion, and acting solely in reference to the interests of the child under the circumstancs of the case. Both positions assume that the real interest of the child is the principle which must govern; but they differ as to the mode by which that interest is to be ascertained and determined.

It would seem, then, that the real question in these cases is not what are the rights of the father or mother to the custody of the child, or whether the right of the one be superior that of the other, but what are the rights of the child; and I cannot but think, that much of the apparent conflict in the various decisions of the Courts in these cases, and in the reasoning which has been resorted to, to sustain them, has arisen from loose and undefined notions as to the nature of the questions involved. They have not unfrequently been treated as if they were cases involving the rights of property rather than mere personal rights, and as if the parents were setting up conflicting claims to a property in the child. The true view is, that the rights of the child are alone to be considered, and those rights clearly are to be protected in the enjoyment of its personal liberty, according to its own choice, if arrived at the age of discretion, and if not, to have its personal safety and interests guarded and secured by the law acting through the agency of those who are called upon to administer it.

On a careful consideration of all the cases on this subject in our own Courts, and particularly of the case of *Barry* v. *Mercein*,* which was repeatedly under discussion in the highest tribunals of the State, I am satisfied that the position contended for by the respondent's counsel on the present occasion, is correct, and that, according to the spirit of all the decisions, the question at issue between these parties must be determined by the exercise of a sound discretion, having reference solely to the present interests of the child. In all the cases, even those in which the superior right of the father seems to have been most strongly maintained, the principle is clearly recognized, that there may be circumstances irrespective of any personal disqualification of the father which may defeat his claim.

The discretion which is thus to guide in the decision of cases like

* 8 *Paige* 47; 25 *Wend.* 64.

the present, is not an unregulated or arbitrary discretion of the Judge, for that has been justly said to be "the law of tyrants," but a discretion governed, as far as the nature of the case will admit, by fixed rules and principles. It is certainly somewhat difficult to define these rules and principles with precision; but, keeping in mind that the present interests of the child are alone to be consulted, I think they may be safely sought for in considerations connected with its age and health.

Where a child is found in the custody of its mother, of tender years, or of feeble and delicate health, and where the necessity of maternal care is evident, the law will not interfere to remove it from from such custody, and could not do it without shocking the common sense and feelings of mankind. But where the child has arrived at an age at which it becomes important to determine upon its course of education and mental training in reference to its future business and establishment in life, it may reasonably be supposed that the superintendence and judgment of the father will better subserve its true interests than those of the mother. While the physical safety of the child, and the incipient stages of its education are the chief objects to be regarded, it is quite clear from observation and experience, that these may be safely intrusted to the mother, and that in general, under such circumstances, maternal is more safe and effectual than paternal care and superintendence.

In applying these principles to the case now before me, and considering the tender age of the child, its somewhat delicate health, and its tendency to certain diseases, which in the judgment of the physician, who is most capable of expressing an opinion, from the opportunities which he has enjoyed of forming one, it seems to me that a regard to its real welfare forbids my interfering with its present situation. I find the child safe where it is, in the custody of its mother, requiring her care and watchfulness, and not, in my opinon, having yet arrived at an age when the superior judgment of the father would be important in laying the foundation of its future education and intellectual culture.

With these views of the spirit of the law, as fairly inferred from all the cases on the subject which have been decided in this State, and in the exercise of that judicial discretion, by which I must be guided, I can only say, as did the Chancellor in the case of *Barry* v. *Mercein*, that in my judgment no good reason now exists for removing the child from the custody of the mother.

THE OBLIGATION OF A CONTRACT. WHAT IS IT?

NUMBER II.

In *Sturges* v. *Crowninshield*, 4 *Wheat.* 200, C. J. Marshall said: "The distinction between the obligation of a contract, and the remedy given to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation, the remedy may certainly be modified as the wisdom of the nation shall direct." But in *Bronson* v. *Kensie et al*, 1 *Howard* 311, the Court say: "That whatever belongs merely to be the remedy, may altered according to the will of the State, provided the alteration does not impair the obligation of the contract." *Ib.* 316. Hence, there are cases in which the distinction between obligation and remedy does not exist in the nature of things—cases in which the remedy is a part of the obligation. And the contract of mortgage seems to present such a case. *Ib.* 318, 319.

The right of action under existing contracts may be shortened, because the power must reside in every State to enable it to secure its citizens from unjust and harassing litigation. *Ib.* 315. For a similar reason, recording acts may operate on conveyances previously made; 3 *Peters* 290. Imprisonment for debt may be abolished, or the implements of agriculture, or the tools of the mechanic, or household furniture, may be exempted from execution, on contracts previously made—all for similar reasons. 1 *How.* 315. But a restriction, by a provision for appraisement or for redemption, on the power of the mortgagee to sell, is not a matter of remedy; it would affect the obligation; it is not necessary that the power should reside in any State to protect its citizens from ruinous sacrifices of their homes. In other words, a question of constitutional power in sovereign States is now only a question of expediency, to be controled by the discretion of the Judges of the Supreme Court of the United States; and this the Court has been pleased to hint to the public in tolerably plain language. 3 *Peters* 290. In this case, *Bronson* v. *Kensie*, the Court give some consequence to the fact that the mortgage contained a power to sell. But it is submitted, that parties cannot by contract make the law, nor direct its officers. Hence, the power to sell could only be material if the mortgagee had resorted to it.

Gantly's Lessee v. *Ewing*, 3 *How.* 707, is also a mortgage case.

According to the law of Indiana at the date of the mortgage, decrees of foreclosure were enforced by a sale on execution, as other lands are sold on execution, and the execution law of that time did not require a sale for any valuation; but the law of the time of sale, required a valuation and sale for one-half. The case was before the Court on an argument as to the facts in substance as follows: A mortgage on land in Indiana in 1838, a decree of foreclosure and sale by execution in 1840, execution in January, 1841, appraisement law in force in February, 1841, and sale without regard to the appraisement law in March, 1841. The Court determine that the sale was valid on the authority of *Bronson* v. *Kensie et al.*

Whatever power a sheriff may possess at common law, in Indiana, and it is supposed in all the States, his powers are defined by statute. In Indiana, the sheriff is a conservator of the peace and keeper of the jail, and it is his duty to execute the process of the Courts; he has not any judicial power, unless as conservator of the peace. The Marshals of the U. S. are created and regulated by statute, are mere ministerial officers, and are without judicial power. The whole power of the sheriff and marshal, in the service of process, may be and continually is delegated; but it is taken for granted that all will admit, that in this country, judicial power is a personal trust, and cannot be delegated.

In *Bronson* v. *Kenzie et al*, the question was raised on a motion for special directions in a decree about to be rendered. 1 *How.* 313. And the Supreme Court determine that the directions should be given. *Ib.* 322.

In *Gantly's Lessee* v. *Ewing*, there was no such motion. The decree usual in Indiana was entered, that unless the money was paid within sixty days, the complainants have execution to sell the land as other lands are sold on execution. But on that execution, the sheriff did not so sell. The sheriff in this case did not regard the law which regulated the sales of other land on other executions, at the time of the sale. The sheriff assumed to himself a judicial power of the highest character. First, he determined a fact, the date of the contract. Secondly, he determined a question of law: the law of the date of the contract. And thirdly, he determined a constitutional question, that the law of the time of the sale was as to this contract, unconstitutional and void. And the exercise of these judicial powers by an Indiana Sheriff, the Supreme Court of the United States affirmed, on the authority of *Bronson* v. *Kenzie*, in which the question was as to instructions to the Marshal!

McCraken v. *Hayward*, 2 *How.* 608; the second case in point of time, was a judgment at law for money rendered in 1840. The appraisement law of Illinois was enacted in 1841. In 1843, the plaintiff applies to the Court to set aside the appraisement returned, and to instruct the Marshal to sell without regard to the laws passed since the judgment; and "that the Court should direct the enforcement of said judgment according to the laws regulating the remedy when said judgment was entered and contract made." The Supreme Court of the United States determined that the motion should be sustained, and the instructions given, the last in the words quoted. This, then, like *Bronson* v. *Kenzie*, was a motion that the Court should determine and instruct, and this does not present any question as to the judicial power of the officer. But this case does present another and almost as—what shall I call it?—grave or ludicrous?—I will take a sort of midway course, and say, singular,—almost as singular a question as that. In no part of the case as reported, is the time or place of making the contract stated, nor anything of its nature. Nothing is shown of the nature of the action, nor of the form or contents of the declaration. It is only stated that there was a judgment recovered in 1840, for a certain amount of money. The Court determine that the judgment shall be enforced according to the law of the remedy in force when the judgment was entered and the contract made." And it is asked, what has the law of the time of the judgment to do with the matter? Why were these words introduced? Are they mere surplusage, or, are they intended as the entering wedge for an addition to the obligation of a contract? This expression is contained in the motion, 3*d clause*, 2 *How.* 610; in the questions submitted by the Circuit Court, 5 *question*, 611; in the opinion of Judge Baldwin, *Ib.* 612; and in the order of the Court; *Ib.* 619. This expression, so often repeated, cannot be the result of carelessness, mere surplusage, but it is intentional to avoid some difficulty in relation to the time or the place of the contract. But it is no more worthy of attention, notwithstanding its high sanction, than it would be, if it had originated in the Star Chamber, or if it were only surplusage. The law of the time of the contract, or the law of the time of the sale, must govern the officer making the sale, and determine its validity; the one, if the constitution acts on the remedy; the other, if it does not. There is no intermediate time; because, but for the restriction in the constitution attaching itself to the one, the will of the Legislature is supreme, and applies the other—the existing law of the land—in every case.

It is admitted that a decree in chancery may determine the manner of sale on execution under it, and this may be done as well by reference to a particular statute, as by setting out the provisions of the statute. In such case, the execution follows the decree, and gives the statute; the officer has no occasion to look behind the execution. But it is denied, that power can be given by any Court to its ministerial officers to determine what was or was not the law on a given subject at a past time. The officer is bound to know the law in force at the time present, the time of his action, but he is not bound to know the law of a past time; nor has he power to determine it, for that would be adjudication; nor can the Court give to him such power, for judicial power cannot be delegated.

So, it is admitted, that in some cases, a Court of law may, by its judgment, determine the date of a contract, and instructs its officers accordingly. This may be done on confessions setting out the contract; it may be done in cases tried by the Court, as by a jury; and it may be done, in cases tried by juries, if the verdict find the date of the contract. But it is denied that it can be done in any other case. And cases might arise, in which, on affidavit showing the date of the contract, the Court might be so satisfied of the date, as to be authorised to determine the date after a general verdict, and to instruct its officers accordingly. But it is denied, that any Court can authorise its officers to determine the date of the contract, or to ascertain the law in force at the date when determined; for that would be judicial power, which the officer has not, and which the Court cannot give him.

The rule as to the power of the Court, when a declaration containing two counts, one good and one bad, is followed by a general verdict, affords an apt illustration. If it is certain that all the evidence applied only to the good count, the court may amend the verdict. So, if it is shown by affidavit that there is no doubt of the date of the contract, and consequently, too, no doubt as to the particular contract, on which the jury found their verdict, the Court might determine the date. But if there was any doubt, how could the Court do this?—how could the Court know the date or the contract found by the jury? And if the Court could not, could the sheriff?

Suppose a declaration containing the common counts only, and a general verdict; or special and common counts, and a general verdict; or any case, except that of a declaration setting out a written contract only, followed by a general verdict, and it is asked, can the

sheriff determine the date of the contract found by the jury? If the Sheriff cannot do this, the rule declared by the Supreme Court, cannot operate generally. But under the sanction of the decisions of the Supreme Court, Marshals and Sheriffs have been and are yet, in case after case, determining the time and the place of the contracts on which the judgments or decrees for which they had or have executions, are *supposed* to be founded. In the last four years, there has been a great rise in the value of real estate in Indiana, and it is still rising. Who can foresee the amount of litigation,—who foretell the evils to flow from this unhappy confusion of obligation and remedy, of contract and judgment; and from the unprecedented extension of the powers of those high authorities in the law, Sheriffs and Marshals?

S. J.

ENGLISH CHANCERY: NOV. 1846. JUNE AND JULY, 1847.

Robinson *v.* Wall.

Whether employing puffers at a public sale, does or does not make the sale void, depends upon the course pursued by the vendor—whether that course be, or be not, in violation of the contract which he enters into with the public, in the mode in which he offers the property for sale. The question is, has the course pursued been consistent with the contract held out to the public.

The terms "without reserve," mean not only "that no person will be employed to bid on behalf of the vendor, for the purpose of keeping up the price,"—that of the bidders who choose to attend the sale, he who bids the highest, shall have the property, but that the biddings shall be among themselves, and that there shall be no means or contrivance, or any interference whatever to prevent open and fair competition.

The bill was filed by J. T. Robinson and J. Gillett, the assignees appointed by the Insolvent Debtors Court, of Sir T. S. Champneys' estate, seeking specific performance by the defendant T. Flight, of an agreement to purchase of the plaintiffs their interest (which was for the joint lives of Sir T. S. Champneys and Lady Champneys,) in certain manors and hereditaments, situate in the counties of Chester, Denbigh, Carnavon, and Flint, and also in certain sums of money, annuities, &c., mentioned in certain particulars and conditions under which the agreement was entered into. The conditions stated that the sale was to be by public auction, and without reserve. Sir T. Champneys first took the benefit of the Insolvent Debtors Act, in the year 1827, and again in 1835; and the plaintiffs were his assignees under the second insolvency, and had had conveyed to them, by the assignee Sturgis, under the first insolvency, all

the estate and effects of the insolvent vested in Sturgis thereunder. In the year 1838, Lord Mostyn was desirous of purchasing the life interest of Lady Champneys in the premises, which she would be entitled to on surviving her husband, and also the interest which, during the continuance of the coverture of Sir T. and Lady Champneys, had passed to the plaintiffs as the assignees of Sir T. Champneys, principally with the view of concurring with his eldest son, Edward Mostyn Lloyd Mostyn, who was entitled in remainder, in barring the estate tail of the latter, and vesting the fee simple in Lord and Lady Mostyn, and their eldest son. Negotiations were commenced in the year 1838, for carrying out the object of Lord Mostyn, who made certain proposals to the plaintiffs and Lady Champneys; and on the 13th of August in that year an indenture of that date was executed, to which the plaintiffs Sir T. and Lady Champneys, and Lord Mostyn, and certain other persons, trustees, were parties, whereby, after reciting (amongst other things) that Lord Mostyn had made proposals for the purchase of the respective interests of the plaintiffs and Lady Champneys in the premises, for 35,000*l.*, and an annuity of 400*l.* a year to Lady Champneys, but that the plaintiffs were advised they had no power as regarded their interest to accept the same, and that it was their duty to make sale of their interest in the estates by public auction, and that they were willing to put up the same for sale by public auction, and to sell the same to Lord Mostyn if he should be the highest bidder at such sale; and that Lord Mostyn was willing to attend at such sale, and to bid the sum of 35,000*l.* for the purchase of such estate, on the understanding that if a higher bidding should be made at such sale, the same should be accepted, and the plaintiffs should not, in that event, be required to accept the sum of 35,000*l.*: it was agreed that Lord Mostyn should, as the conditions for the purchase of the interest of Sir T. Champneys, his assignees and creditors, in the premises, pay the plaintiffs the sum of 35,000*l.*, and that the plaintiffs would permit such sale to take place without any reserved price, or bidding in the nature of a reserved price, save and except so far as the proposed bidding of the sum of 35,000*l.* by Lord Mostyn, might be deemed a reserved price or bidding; and that if Lord Mostyn should at such sale bid the sum of 35,000*l.*, or any higher sum for such estate, and there should be no bidding higher than his, the said estate should be knocked down to him at such bidding of 35,000*l.*; but if such bidding of 35,000*l.* should not be the highest bidding at such sale, and Lord Mostyn should not think fit to make

any higher bidding, then it was agreed that such estate should not be knocked down to him, and he should not be the purchaser thereof, or in any manner bound by any of the covenants and agreements therein contained; and Lord Mostyn undertook to bid at the sale, subject to the conditions and stipulations therein contained, the sum of 35,000*l.* for the purchase of the estate of the plaintiffs, including the surplus of certain stock and moneys therein mentioned: but if the bidding of 35,000*l.* should not be the highest at such sale, the said indenture should be thereupon (at the option of said Lord Mostyn) null and void to all intents and purposes whatsoever. And it was by the same indenture provided, that Lord Mostyn should not be bound by any particulars or conditions of sale which might be prepared by or on behalf of the plaintiffs, for the purpose of the sale by auction, differing in any respect from the terms and agreements therein contained, unless a copy of such particulars and conditions, should previously to such sale be signed by him or his solicitors.

At a meeting of the creditors of Sir T. Champneys, on the 1st of October 1838, their assent to the sale was duly obtained; and it was at the same time agreed that the sum of 35,000*l.* should be fixed as the reserved bidding. The two proposals of Lord Mostyn for the purchase of the plaintiffs' and Lady Champneys' interests in the estates, &c., were to form one entire contract. Particulars and conditions of the said intended sale by auction, were then prepared, and a copy thereof, previously to such sale, was submitted to the solicitors of Lord Mostyn and Lady Champneys, who made certain alterations therein, and laid the same before their counsel for perusal, who also made alterations therein, and afterwards approved thereof on behalf of Lord Mostyn and Lady Champneys, as follows, viz.:—"I have perused and settled this draft; and as far as I can understand it from recollection, and without the agreement, &c., before me, I approve thereof on behalf of Lord Mostyn and Lady Champneys." The sale took place by public auction, subject to those particulars and conditions, on the 10th of November, 1838, when the plaintiffs' interest in the premises was knocked down to Wall, the agent of T. Flight, as the highest bidder, at 50,000*l.*, Lord Mostyn having bid at the sale the sum of 49,800*l.* A correspondence at great length then arose between the plaintiffs' solicitors and the solicitors of Wall, the agent of Flight, with reference to the title, during which, and within twelve months after the sale, Sir T. Champneys died. Flight thereupon, in the name of his agent, Wall, brought an action against the auctioneer for the recovery of the amount of the deposit-money

(5,000*l.*) paid in respect of his purchase, upon which the plaintiffs filed the present bill.

The plaintiffs, after the date of the contract, sold part of the real estates to the Chester and Crewe Railway Company, under the compulsory clauses of an act of parliament obtained by that company; and they also filed a bill against Lady Champneys, to compel a specific performance of a contract by her for the purchase of the same estates, under another indenture, dated the 13th of August, 1838, whereby Lady Champneys agreed to give 35,000*l.* for the premises, in case the purchase by Lord Mostyn should not take place, or should not be completed, either by reason of the decease of Sir T. Champneys in the life-time of Lady Champneys, or from any other cause whatsoever. That suit was afterwards compromised, with the assent of the creditors of Sir T. Champneys, by the payment to the plaintiffs of 21,500*l.* by Lady Champneys, towards satisfaction whereof the stock and cash in the Court of Chancery standing to the credit of the cause *Sturgis* v. *Champneys*, and also in the Insolvent Debtors Court, was agreed to be applied. The benefit of the contract with Flight was offered to be assigned to Lady Champneys, but she declined to accept it, and left it to his assignees to prosecute. The judgment, however, of the Master of the Rolls proceeded exclusively on the terms of the contract entered into between the plaintiffs and Lord Mostyn, and the circumstances relating thereto. Mr. Kinpersley and Mr. Chandless, in support of the bill, before the Master of the Rolls. Mr. Turner, Mr. R. Roupell, and Mr. Rogers, for the defence.

The following authorities were cited in the course of the arguments:—*Wright* v. *Maunder*, 4 *Beav.* 512; *Wheeler* v. *Collier*, *Moo. & Mal.* 125; *Knatchbull* v. *Grueber*, 3 *Mer.* 124, *vide p.* 144; *Harnett* v. *Yielding*, 2 *Sch. & Lefr.* 549; *Cadman* v. *Horner*, 18 *Ves.* 10; *Davis* v. *Symonds*, 1 *Cox* 402; *Viscount Clermont* v. *Tasburgh*, 1 *Jac. & Walk.* 112; *Meadows* v. *Tanner*, 5 *Mad.* 34; *The King* v. *Marsh*, 3 *You. & Jer.* 331; *Withy* v. *Cottle*, 1 *Sim. & Stu.* 174; *Doloret* v. *Rothschild*, 1 *Sim. & Stu.* 590. The Master of the Rolls dismissed the bill.

The plaintiffs appealed from this decision, and the case was argued before the Lord Chancellor, in June, by—

Mr. Bethell, Mr. Rollt, and Mr. Chandless, for the appellants; and

Mr. Stuart, Mr. Roupell, and Mr. Rogers, for the respondent.

Mr. Bilton appeared for the auctioneer.

Smith v. *Clarke*, 12 *Ves.* 477; *Conolly* v. *Parsons*, 3 *Ib.* 625 *n.*; *Howard* v. *Castle*, 6 *Term Rep.* 642, were cited, in addition to other authorities, which were referred to before the Master of the Rolls.

July 10, 1847.—The Lord Chancellor.—The Master of the Rolls in this case was of opinion that the purchase by auction was void as against the purchaser; that is, that the vendors could not enforce the contract against the purchaser, upon the ground of its not having been conducted upon terms consistent with the contract held out to him by the particulars of the sale, the sale advertised professing to be without reserve, and the facts having taken place under the circumstances which I shall presently advert to. Now, that a sale by auction without reserve, where there has been a bidding on the part of the vendor for the purpose of keeping up the price, cannot be enforced against the purchaser, was decided by Sir John Leach, in the case of *Meadows* v. *Tanner.* 5 *Mad.* 37. Although that was the only case referred to, and the only one that I am aware of that exists, where the precise and particular circumstance arose, and the point was decided; it is, in fact, involved in all the numerous cases which have arisen, in which questions have been raised, whether employing puffers at a sale does or does not make the sale void. They all proceed upon this:—the question is, whether the course pursued by the vendor be or be not in violation of the contract which he enters into with the public in the mode in which he offers the property for sale. Sometimes it has been said one puffer may be allowed, and sometimes that two will make it void, although one will not. A variety of decisions, not reconcileable with each other, has taken place upon these points, all proceeding upon the question whether, in the opinion of the Court, the course pursued has or has not been consistent with the contract held out to the public. In any case, therefore, in which it is clear that the course pursued has not been consistent with the contract held out to the public, all those cases establish the principle, as naturally they must, and it is a principle of equity, that a contract cannot be enforced which has been obtained by a course of proceeding inconsistent with good faith.

The question therefore is—and the only question, for there is no doubt upon the law—whether what took place in this case, was or was not in violation of the contract proposed to the public, namely, that the property should be sold without reserve. Now the terms "without reserve," in that case before Sir John Leach, are defined by him to be—what? "Without reserve," he says, means, "that

no person will be employed to bid on behalf of the vendor for the purpose of keeping up the price." That might be a very good definition so far as related to the particular case to which it was meant to apply; but it does not quite go to the extent to which the terms necessarily refer. When a property is offered for sale without reserve, the meaning, and the only meaning that can be attached to it is, that the bidders, the public who choose to attend the sale, shall have it whoever bids the highest; and "without reserve" means that the biddings shall be among themselves, and that there shall be no biddings on the part of the vendor, because it is to be without reserve. In whatever mode or form you put it, it is not without reserve, it is not left to the bidding of the public without the interference of the parties, if by any means or contrivance, it matters not what, there be means resorted to by which the vendor is to prevent the effect of open competition. I consider, therefore, the terms "without reserve" to exclude any interference on the part of the vendor, or, which is the same thing, those who come in under the vendor, to interfere with the right of the public in the property purchased by the highest bidder, and that without reference to the amount to which that highest bidding shall go.

What took place, although it is rather complicated, appears to me to amount to a reserve, or precisely identical with the same thing, so far as the public is concerned, which is the only way you can look at it. It is quite immaterial what took place between the vendor and any other person; that is only the machinery by which the effect is produced. I look to see what is the effect of what took place as regards the public—as regards those who attended the sale. The result of the arrangement between the vendor and Lord Mostyn was, that there should not, in fact, be any sale by auction at all unless the price exceeded 35,000*l.*; therefore it was a mere mockery of a sale under that price. Any person going into the auction room and intending to bid for this property, had no chance whatever of purchasing it unless it exceeded 35,000*l.* Now, whether the vendor instructed the autioneer not to knock it down to any bidder under 35,000*l.*, but to buy it in, as it is called, or knock it down to a person employed to bid for the vendor, or to a person with whom the vendor had contracted he should have it at 35,000*l.*, and that no bidding should interfere with his contract under 35,000*l.*, as far as the public is concerned it is precisely the same: there is no bidding which can have any effect. What is held out to the public as being a sale without reserve, is not a sale without reserve; it is a

sale with a reserve; that is to say, with that arrangement which prevents the possibility of any one of the public purchasing the property unless it exceeds a certain amount. If the sale takes place beyond that certain amount, it is not cured by the circumstance of there being a bidding above it. That is consistent with the principle of all the cases, because that may have been produced by that very mode of proceeding. It may very possibly be that if the property had been put up for sale, strictly speaking, without reserve, leaving it entirely to the public to bid whatever they thought right, it never might have attained 35,000*l.* If it attains 35,000*l.* by reason of the arrangement between the vendor and those with whom he is dealing, then the circumstance of a person bidding higher, cannot bind the party who was not bound when he came into the auction room and began to bid.

It appears to me, therefore, notwithstanding the complicated arrangement between the vendors and Lord Mostyn to purchase for 35,000*l.*, and without adverting to the provisions of the deed, which are, as it stands, perfectly unintelligible, and do not affect the present question, that that arrangement by which the public were prohibited from the possibility of purchasing under 35,000*l.* was, within the meaning of the terms "without reserve," a reserve, and therefore inconsistent with the contract held out to the public. Consequently, the decree of the Master of the Rolls is right, and the appeal must be dismissed with costs. *Vide Thornett* v. *Haines*, 4 *W. L. J.* 15.

OHIO SUPREME COURT IN BANK.

On the 23d December, at the Dec. Term, 1847, of that Court, in *Chesnut* v. *Shane's Lessee*, it was held—C. J. Birchard delivering the Opinion:

1. That a deed of a married woman is valid and passes her estate, where there exists no other objection than that the Justice, in certifying the acknowledgment, has omitted incorporating into the certificate, the statement that before and at the time of her making such acknowledgment, he made the contents known to her by reading or otherwise.

2. That an act of the Legislature that divests vested rights, that violates contracts, or that assumes to control or exercise *judicial power*, is unconstitutional and void.

3. That the act of March 9, 1835, is not liable to either of these objections, and is a valid law.

4. That a confirmatory act which merely assumes to cure an informality in the certificate of the magistrate, creating no new title and affecting no right but such as equitably flows from the grantor, that merely accomplishes what, upon the principles of natural justice, a court of Chancery ought to decree, may have a retrospective operation, where the manifest design of the Legislature was that it should thus operate.

5. That in construing ancient statutes, contemporaneous construction, as evidenced by usage, will not be departed from without most cogent reasons, and if the construction be doubtful, usage will control.

The cases of *Connell* v. *Connell*, *Good* v. *Zercher*, *Maddock* v. *Williams*, and *Silliman* v. *Cummins*, overruled, and in the case at bar the judgment below reversed.

SUPREME COURT OF PENNSYLVANIA.

HALEY *v.* BROWN.

THE December number (1847) of the Pennsylvania Law Journal, page 72—*Held:* 1. The question of due diligence in seeking to give notice of dishonor of a note, is for the Court, the facts being undisputed.

2. A notice deposited in the Philadelphia Post Office, addressed to an indorser generally, is insufficient when he resides in Roxborough, and the nearest Post Office at which he receives his letters, is at Manyunk.

3. To excuse a want of notice by reason of ignorance of an indorser's residence, such ignorance and due diligence to discover it, must be shown on the part of the note deposited for collection, as well as of the notary and bank.

Miscellaneous.

The License Law. We learn from the Pa. Law Journal, that the Supreme Court of that State, at a term recently held at Pittsburgh, in the case of *Parker* v. *The Commonwealth*, decided that the act of the Pennsylvania Legislature, passed in 1846, entiled "An Act authorizing the citizens of certain counties to decide by ballot whether the sale of vinous and spirituous liquors shall be continued in said counties," was constitutional. The Court were divided in the ratio of three to two. Judge Bell delivered the opinion of the majority—Judges Cutter and Bornsides dissented. We have in Ohio a statute somewhat similar: and the points made by the Court may be, to some extent, applied to some other statutes. We add what is said in the Law Journal:

"The length of the decision precludes our publishing it in full in the Journal. A careful analysis of the points made, and course of argument followed by the majority, (too meagre, we fear, to do justice,) is subjoined."

'Although the government of Pennsylvania is not like that of the United States, one of enumerated powers, still its authority is limited; and an act of its legislature, contravening no express provision of the Constitution, may still be invalid, if in violation of the spirit of that instrument, and the genius of the institutions designed to be created by it. Admitting, in the fullest extent, the great truth, that 'all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness,' still it has been found impracticable and mischievous in large communities, for the people to exercise the powers of government on the principles of pure democracy. By the introduction of original written compacts, framed by the people themselves, a marked distinction has been established between the unlimited and indefinite power of the community considered as a whole, and the definite and limited power of the legislator, who is but an agent to perform certain duties, which must be exercised only in the manner pointed out in the compact. By this compact, the people of Pennsylvania have delegated all legislative power to a General Assembly, consisting of a Senate and House of Representatives, divesting themselves at the same time, solemnly and emphatically, of all right to make or declare the law, or to interfere with ordinary legislation, otherwise than in the manner pointed out in Art. IX, § xx, which declares that "the citizens may assemble in a peaceable manner, and petition for a redress of grievances." To make laws is not so much the privilege of the General Aesembly, as it is its duty, whenever the good of the community calls for legislative action. No man is bound to accept the office of legislator, but once having accepted, he cannot evade the duties and responsibilities incident to it. The maxim, that *delegata potestas non potest delegari*, is a primal axiom of jurisprudence, and is more especially so, where it rests in a confidence partaking of the na-

ture of a trust, and requiring for its discharge, understanding, knowledge, and rectitude. Not even to the *whole people* then, can the representative delegate his authority; they have expressly forbidden this, by the solemn expression of their will, that "the legislative power *shall* be vested in the General Assembly,' *a fortiori* then, it cannot be relinquished to a *portion of the people.* The people of this Commonwealth have reserved to themselves the right to abolish and reconstruct the political fabric, and may assume, if they please, the direct control of ordinary legislation. It is not likely they will ever do this: it is not certainly for their servants to anticipate the expression of such a will.

'The great question here is, did the legislature of 1846 fall into this error? This question will be best resolved, by an inquiry into the nature of municipal laws, and ascertaining how far the act of Assembly under review, squares with the definition of such laws.'

"The Court here defined municipal law, (*see Black. Com. vol.* 1, *p.* 44,) and declared the definition as applicable under our institutions, as under those of Great Britain, with the single modification, that here, the maker's will is subordinate to constitutional injunction.

"They then proceed to review the several acts of Assembly in relation to licenses to sell vinous and spirituous liquors, and come, in order, to this of April 7th, 1846, which provides in substance, that 'it shall be lawful for the citizens of the several boroughs, wards and townships, in certain counties named, including the county of Allegheny, at the annual election of township officers, to determine by vote whether the sale of vinous or spirituous liquors should be permitted among them for the ensuing year; that whenever, in any of said boroughs, &c., there shall be a majority of votes 'against the sale of liquors,' the Court of Quarter Sessions shall not for the ensuing year, grant license to any inn or tavern, nor the treasurer of the county issue a license to any retailer of merchandise for the sale of vinous or spirituous liquors, within said borough, &c., for said year; that if any person in said borough, &c., should, within one year, sell and deliver, or cause to be sold and delivered to any person, any vinous or spirituous liquors, except as provided in the act, such person shall be liable to be indicted, &c.; but if any of the boroughs, &c., in the said county, shall by a majority of votes decide 'for a sale of liquors,' then the laws in force, regulating the business of inns and taverns, and retailers of foreign goods and merchandize, including liquors, shall remain in force, as if the act had not been passed,' upon which they say:"

'This act depends for its validity and binding efficacy, upon the popular vote of designated districts. Instead of leaving the Legislature complete in the essential requisites of every law, it operates only by virtue of a mandate, expressed subsequently to its enactments. That is not law which is not obligatory upon those who are to be subjects of it.

'There appears to be no legal authority, from which the Act of 1846 derives its mandatory and obligatory character, the citizens by whose votes, it is alleged, this character is derived, were vested with the power to act by the General Assembly, which itself, it has been shown, possessed no authority to make such transfer. As well might a Governor refer to the people to declare whether a criminal should be pardoned or executed, or a Court direct judgment to be entered in a civil action for whichever party the people of a county should decide. The mass of the community cannot be called to the aid of any one of the constituent elements of the government, in any other mode than that pointed out by the fundamental law. If such a practice should be sanctioned, every case of doubtful propriety would be referred to the decision of the ballot-box, by faithless legislators, anxious to escape the responsibility of their position. It is not denied, that in contemplating important

changes in existing laws, the constituent should be consulted; but the Legislature must adopt this will in the form of a statute, before it can have the force of a law. It is urged that this system of legislation has become legitimated by long custom, and our attention as been called to several supposed instances. Did these really exist, they would cause hesitation in arriving at a conclusion adverse to the validity of the action impeached in this case, but would not justify us in declining to express the conclusion that the Legislature has transcended its authority. In questions of property, an error of long standing may be permitted to stand, because the correction might produce more mischief than would be worked by its continuance. But such an argument has no place where the error threatens the political existence of a State. With the exception, however, of a single class of modern origin, we think no legislation, of a similar character to this, can be found.'

"The cases of municipal corporations clothed with power to make by-laws; the Acts of Assembly, in relation to Common Schools; the non-intercourse Acts of Congress, of March, 1809, and May, 1810; and the Act of Assembly, of the 14th of April, 1835, which submitted to the citizens of the State, the question whether a Convention should be holden—having been successively examined, and the distinction between them and the act under consideration pointed out, they go on to say:

'The right exercised by Congress of erecting the public domain, from time to time, into territories, and organizing them for the purposes of government, by authorizing the election of executive, judicial, and legislative officers, and conferring on the latter the power to make laws subject to the approval of Congress, affords no argument against the view taken by this Court, as that power is expressly granted by Art. 4, § 3, of the Constitution of the United States. The only class of acts which seems to sustain the one under consideration, is a series commencing about the year 1839, and coming down to the present day, acts providing all the details necessary for the erection and government of poor houses, in the counties named in those acts, and leaving the question of the erection of the house to the decision of the people of the county: whether these acts can be distinguished in principle from that under consideration, it is not now necessary to decide. If they be unconstitutional, they serve to show how a dangerous practice may creep unnoticed into the Legislature, but they cannot justify its continuance.'

"The Court then declared the Act inoperative and void, and reversed the decision of the Quarter Sessions of Allegheny County."

Legal Reform in Ohio. We have received from the Chairman of the Judiciary Committee of the House of Representatives of this State, a copy of a bill, introduced by Mr. Pennington, "to extend and apply the forms of proceeding in chancery to all cases at common law." We have not room to give or speak of the details of the bill. One of the resident Editors concurs fully and entirely in the principles of the bill and all its provisions, and heartily desires its passage. He has heretofore advocated such a measure in and out of the Journal. The other Editor differing from his colleague on this subject, has deemed it advisable to take this occasion to express that dissent. He has abundant reason to know the learning of his colleague, and the value of his opinion upon any question connected with jurisprudence, but he is compelled, from the convictions of his own judgment, to differ, in this particular, widely from him. He is opposed to all *such* changes, believing that true law reform, as to the law of procedure, should take another direction, as, in his opinion, is very manifest in the beneficial results from the late reforms in England. He is an earnest advocate for all reforms which shall aid in the more speedy and effectual administration of right and justice, but cannot see how the measures proposed will effect that object.

It has been said by a learned judge, that "We must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion," and the same sentiment has been frequently repeated from the Bench. Whether this is true to the extent here claimed, there is not room, if there were inclination, to inquire. It becomes those upon whom the responsibility rests, to make the inquiry.

The abuses of the system of pleading as they have existed in England and in some of the States, have not been found in Ohio. If all the jargon of former days, as well as the verbosity of a later period, have not long since been rejected, let us do as they have done in England—reform, not abolish a system so intimately blended with what is our pride and our boast, the common law,—and which, as Lord Tenterden says, was "founded upon and adapted to the trial by jury." Let the law be settled, if, indeed, it is not, as some now suppose, already well settled in Ohio, that pleading is in truth the statement, in a logical form, of the facts which constitute the plaintiff's cause of action, and the defendant's ground of defence. No new rule can be devised by petition, answer or otherwise, which will set forth this cause of action or ground of defence in a more "plain and succinct manner" than by this rule of pleading. The writer agrees with that pre-eminently distinguished lawyer, the late Chancellor Kent, who, when Chief Justice of the Supreme Court of New York, entertained and expressed "a decided opinion, that the established principles of pleading, which compose what is called its science, are rational, concise, luminous and admirably adapted to the investigation of truth, and ought consequently to be very carefully touched by the hand of innovation."

It is proposed to abandon the established principles of pleading as known in the English law; not to modify or change some of the forms, but to abolish the science itself—totally—entirely. What would Littleton, and Coke, and Sir Wm. Jones, and Lord Mansfield think of such a proposition?

Before such radical changes are made, there should be the fullest discussion and examination. All the lights of experience should be brought to bear upon the question.

If it is determined to destroy this system "so admirably adapted to the investigation of truth," and introduce this mixed Continental and Scotch system, perhaps the bill, now offered, is the best, without experience, that can be framed.

There is one provision in the bill in question, not necessarily connected with this subject, which we should be willing to see incorporated with our present system, and that is, requiring the charge of the Judge to the Jury to be in writing

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Harrison v. *Cotgreave.* [E. Com. Pleas, 16 L. J. R. 189.] *Pleading—Duplicity—Infancy.* The declaration stated, that the plaintiff drew his bill of exchange, dated, to wit, on the 16th Feb., 1846, which the deft. afterwards, to wit, on the day and year aforesaid, accepted. The plea stated that the deft. accepted the bill whilst he was an infant, being at the time of its acceptance, without date: that the pltff. afterwards altered the bill by dating the same, to wit, the day and year aforesaid, whereby the bill was made to bear date of a day long after the making and acceptance of the bill, and after the time at which the deft. attained his age of 21 years, to wit, &c., and that there never was any license or authority, ratification or assent of the deft. for or to such alteration, after he attained the age of 21. Verification—*Held:* That the plea was a good plea, and that it disclosed only a single defence—infancy. Wilde, C. J., said: "The plea is not multifarious; it is not ambiguous; it does not disclose two defences; the several allegations are introduced to make up the single defence of infancy, and the plea must be taken to mean that the alteration was introduced, not without authority in point of fact, but without such authority as renders me liable."

Coltman, J., at first doubted whether there were not two distinct defences contained in the plea, but became satisfied such was not the case.

Maul, J., said it was a good plea of infancy: "The whole acceptance was complete, before I came of age, and I did not ratify it afterwards." He thought the plea was complete at the end of the first paragraph. The addition of circumstances did not alter it or add another defence: "I accepted when I was an infant."

Tuckey v. *Hawkins.* [E. Com. Pleas, 16 L. J. R. 201.] *Statute of Limitations—Bond—Pleading.* To a declaration on a bond, not setting out any condition, plea, that the debt and cause of action in the declaration mentioned, did not accrue within 20 years. Replication, taking issue thereon. At the trial, the bond and condition were produced, when it appeared that the bond had been executed more than 20 years: but the condition was for the payment of the money within 6 months after the death of a party who was proved to have died within 20 years before the commencement of the suit. *Held:* That the plea was disproved.

Semble—That the plff. might have replied, showing when the condition was broken. And Coltman, J., intimates that possibly the replication was open to special demurrer, because it is rather to be inferred from the declaration that the cause of action accrued more than 20 years ago, but as the deft. had gone to the Jury, the question did not arise.

Death of Jeremiah H. Hallock. The Gazette of this city announces the death of Judge Hallock. We cannot now give our readers a sketch of the life of this justly esteemed citizen. We hope that some one of his numerous friends in the old fifth Circuit will prepare one for us. The writer first remembers Judge Hallock as Prosecuting Attorney of Jefferson County: subsequently he was elected a member of the House of Representatives of the State. This was, we think, the session of 1822–23. It was at this session that provision was made for the Court in Bank; and we are informed that Judge Hallock may justly be considered the father of that Court.

During this session, he was elected President Judge of the Court of Common Pleas, of the fifth Circuit, then composed of the counties of Jefferson, Columbiana, Stark, Harrison, Belmont, Guernsey, and Monroe, and perhaps Tuscarawas. At this time, among the members of the bar who practised in that Circuit, there were some of the best lawyers in the West—Philip Dodridge, Charles Hammond, Benjamin Tappan, John C. Wright, John M. Goodenow, Elisha Whittlesey—with many others of that time, as well as of a later period, who have by their diligence and learning won distinction in the profession.

Judge Hallock was a learned lawyer, and an excellent Judge. He was continued on the bench for a second term, in all fourteen years. At the expiration of his term, he declined a re-election, and about that time removed to his farm on the hills near the banks of the Ohio, a few miles below Steubenville, where he passed the remainder of his days, devoting his time principally to agricultural pursuits.

Lewis' Criminal Law. [An Abridgment of the Criminal Law of the United States; containing the important Penal Acts of Congress of the United States, and of the Legislatures of the principal States of the Union; accompanied with a brief statement of the Law of England, the Decisions of the Federal Courts of the several States, relative to Crimes and Misdemeanors: Containing also the Treaties of Extradition, entered into by the United States with England and France, and the Acts of Congress and several States relative to the Surrender of Fugitives from Justice and from Labor; with the Practice and Forms of Proceeding under the same. To which are

added Precedents of Indictments and Pleas. By Ellis Lewis, President of the Second Judicial District of Pennsylvania. Philadelphia: Thomas, Cowperthwaite & Co. 1847.]

The general features of this work may be inferred from the above title. The design is to furnish a sort of *concordance* of the criminal law of the United States, and of several of the States. It does not profess to take in all the States, nor to present in minute detail the criminal law of any one State. It takes the most important crimes alphabetically, and under each exhibits the Federal, and several of the State provisions, together with the judicial decisions relating to it, as also the forms of procedure. The project, so far as we know, is new. But the author appears to have bestowed great labor upon it; and we think he has made a very useful book. The student and practitioner of criminal law, and even the legislator, have here a help very much needed, and not in any degree heretofore supplied.

New York Chancery Reports. [Reports of Cases argued and determined in the Court of Chancery of the State of New York. By Oliver L. Barbour, Counsellor at Law. Vol. I. New York—Banks, Gould & Co.: Albany—Gould, Banks & Gould. 1847.]

The volume of Reports, the title of which is given above, is a continuation of the decisions in Chancery in that State, heretofore reported by Messrs. Hopkins, Johnson and Paige, and constitutes the nineteenth volume. It is the first appearance of Mr. Barbour in his present capacity, although favorably known to the profession throughout the Union as the author of treatises upon the subject of Chancery Practice, Local Criminal Law, and the Law of Set-off. It contains the decisions made from August, 1845, to September, 1846. We are informed that it will require some three or four volumes more to include the cases pending in the Court of Chancery, which, as our readers will recollect, has been dispensed with by the new Constitution, and merged in that of the Supreme Court.

We regard this first essay of Mr. Barbour as a fine specimen of legal reporting. His statements of the facts of the case, and points decided, are clear and concise, and, so far as we are able to judge, accurate—qualities much too rare in this and other kinds of scientific authorship. A due regard, also, appears to have been had to the arguments of counsel, which, in our opinion, often add to the intrinsic value of a volume of Reports.

The mechanical execution of this volume is superior to that of any we have seen from the New York press. This department depends not a little upon the taste and judgment of the Reporter, and when the price of law books is taken into consideration, the profession have a right to demand that proper attention should be paid to it.

Barnes v. *Ward.* This was an action brought under the recent statute, 93 *c.* 9 & 10 *Vic.*, (for which see 4th vol. this work, p. 233,) enabling compensation to be given to the families of persons killed by accident. It was tried before Mr. Justice Coltman and a jury, at Westminster, in May last. The plaintiff was a person in humble condition in life—his wife was a washerwoman, going out to char and wash, and able to earn 2 to 3 shillings per day by her labor. They had three children—a boy, 14 years of age, who was in service, able to earn a little, and two girls, one 10, the other 7 years of age, at home.

One evening, the plaintiff's wife, her sister, and the two children, and a niece, were passing a newly made street—it was unlit, and the houses in it unfinished, though there was some evidence that the road had been used as a public pathway for 25 years. The plaintiff's wife fell down an unguarded area before a house belonging to the defendant. On being taken out she was found to be dead.

The Court instructed the jury to consider whether or not there was a public footway near these houses, or whether or not the road was a mere occupation one—also whether the area abutted upon the footway, or was so near as to make it dangerous, if unprotected, to the public passing along the footway—whether the negligence of the plaintiff's wife led to the accident. If they found for plaintiff on these points, they would then consider what damages they would give—what compensation should be given to the plaintiff for the loss of his wife, who contributed towards the support of himself and family—what portion of the damages should be awarded to the husband, and what to the children.

The jury found for plaintiff damages £300: of this £100 to the plaintiff, £75 to each of the girls, and £50 to the boy.

The jury expressed a wish that the money given to the children should be secured to them. Judge Coltman said, the Court would consider how that could be done. The act was defective in not providing any means to effect that object.

Death of James Ross. The members of the Pittsburgh Bar assembled in the District Court Room of that city on the 29th November, 1847, when the decease of this distinguished gentleman was announced as the reason of their being called together.

A Committee, consisting of Messrs. Wilson, McCandless, C. Darrah, and A. Burke, were appointed to draft resolutions, expressive of the sense of the meeting under the circumstances, and the respect felt for the character of the deceased.

The meeting assembled again in the afternoon, when Mr. Justice Grier was called to the chair, Hon. W. Forward and Hon. A. W. Loomis, were appointed Vice Presidents, and A. Burke and A. Marks, Esqrs., named as Secretaries.

Mr. McCandless from the Committee, reported the following resolutions, which were unanimously adopted:

The senior of the Pennsylvania Bar is no more—James Ross, celebrated throughout the Union as a Lawyer and a Statesman, departed this life on Saturday, at his residence in Allegheny City: and the Bar of Pittsburgh, profoundly appreciating his great talents and varied learning, have assembled on this occasion to do honor to his illustrious memory. With Addison, and Semple, and Campbell, and Woods, and Foster, and Baldwin, he gave character and reputation to this Bar. His deportment was that of a polished gentleman; and his forensic eloquence made an impression upon the minds and hearts of the people of Western Pennsylvania, that will not soon be eradicated. His knowledge of the law is stamped upon the Reports of cases argued and determined by the gigantic intellect of that early period, and the Journals of the Senate of the United States bear witness to the greatness of his statesmanship.

Resolved, That the event we deplore, although in the course of nature expected, fills us with grief.

Resolved, That we will endeavor to imitate his virtues.

Resolved, That we will wear the badge of mourning, and attend his funeral in a body, to-morrow morning, at 9 o'clock.

Common Law Digest. [A General Index to the English Common Law Reports, Vol. I. to XLVII. inclusive. By the Hon. John Sharswood, and Geo. W. Biddle, Esq. Philadelphia: T. & J. W. Johnson. 1847.]

This long sought for work has, finally, made its appearance, and the profession will now be saved the trouble of examining the separate index of forty-seven volumes, most of which were composed of cases condensed.

We learn from the preface that this arduous labor was originally commenced by Judge Sharswood, when at the Bar, who relinquished it to Mr. Biddl , on his acces-

sion to the Bench of the District Court of Philadelphia. His labors extend to about one third of the work. No apology, in our view, was due from Mr. Biddle, for the mode in which the Index is presented to the public. We cannot give our readers a better idea of that mode than by quoting the following from Mr. Biddle's preface:

"The aim of the present work—how successfully it has been attained remains for the profession to say—is to lead the inquirer at once to the principles of law of which he is in search. For this purpose, each title has been divided into numerous heads and sub-heads; and the matter has been frequently repeated under different appropriate titles. Wherever the principles established by the cases have been thought capable of concise expression, it has been done, as in the great majority of instances; where, however, cases have been found incapable of an analysis, in accordance with the design of the work, full references have been made to the points decided, as it has been deemed improper to introduce a statement of the facts of the cases, except where it could be done with brevity, and in harmony with the character of the Index. Where a subject has been discussed as a distinct title, and also forms a head under another title, which is not unfrequent throughout the work, it will be found more fully treated of in its independent position: and those subjects of more direct appliplication to the state of our law, have been more fully dwelt upon than upon subjects of a peculiar or almost exclusive local character. As the thirty-eighth volume of the series of the English Common Law Reports contains the first volume of Deacon's Reports of Cases in Bankruptcy, the Index contains copious references to that branch of the law, including many interesting points under the practice of the Courts of Bankruptcy."

If Mr. Biddle has prosecuted that aim to the extent which our casual examination leads us to believe he has, he has given us one of the best digests of Reports ever published in this country. He commenced right, and we have no doubt he has gone through with his arduous task right.

Nuisance. State v. *Vansickle.* [Reported in Dec. No. (1847) Pa. Law Journal, 82.] Indictment for a nuisance tried before Mr. Justice Sergeant, of the Supreme Court, at Nisi Prius. Held, 1. A pig-stye in a city is *per se* a nuisance. 2. It is no defence that the nuisance has been conducted in the same place for a long series of years, as no nuisance can be justified by prescription; nor that it has become necessary to the community in which it is situated. 3. A nuisance in a city is not the less obnoxious to indictment, from the fact that it is connected with a large and flourishing manufacture.

Concordance of the American Constitutions. We are pleased to announce that Professor Francis Lieber, of Columbia College, S. C., is now preparing a synopsis of all the American Constitutions, upon the plan of Joseph's *Concordance Codes des Civiles.* From the list of Queries, sixty-nine in number, addressed to gentlemen in each State and Territory, we infer that his synopsis will go considerably beyond the provisions, and exhibit to some extent the workings of the various Constitutions.

Hon. Henry Wheaton. This distinguished diplomatist and lawyer has been engaged to deliver a course of Lectures upon the Civil Law and the Law of Nations, at Harvard University.